84-1103

No._____

In the

Supreme Court of the United States

October Term, 1984

William Lloyd Hill ..... *Petitioner*

V.

A.L. Lockhart, Director,
Arkansas Department of Correction ..... *Respondent*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is a state prisoner entitled to an evidentiary hearing in a United States District Court habeas corpus proceeding where the prisoner has pled in his petition that his state court negotiated guilty plea was involuntary and resulted from ineffective representation of counsel in that his attorney misadvised him as to his potential parole eligibility date and as a result of that advice the prisoner accepted the plea offer and entered the guilty plea?

LIST OF INVOLVED PARTIES

The involved parties are listed in the style of the case.

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REFERENCE TO THE OFFICIAL REPORT OF THE OPINION BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is reported at 731 F.2d 568 (8th Cir. 1984). The decision of the United States District Court for the Eastern District of Arkansas, Western Division, was an unreported decision.

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Eighth Circuit was filed on April 9, 1984, and appears in the appendix to this brief. A Petition for Rehearing en Banc was filed by the Petitioner. A Rehearing en Banc was

granted. An order was entered by an equally divided court affirming the judgment of the District Court on September 20, 1984. The mandate of the Eighth Circuit was issued on October 15, 1984. A Writ of Certiorari is sought from this Court pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

STATEMENT OF INVOLVED CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS

Amendment VI of the United States Constitution states—

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law and to be informed of the nature and cause of the accusation against him; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

Amendment XIV of the United States Constitution, Section 1 states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The jurisdictional basis of the United States District Court for the Eastern District of Arkansas rested upon 28 U.S.C. §2254. The appellate jurisdiction of the United States Court of Appeals for the Eighth Circuit rested upon 21 U.S.C. §1291.

The Petitioner William Lloyd Hill, a prisoner in the Arkansas Department of Correction, filed a "Petition for Writ of Habeas Corpus By Person In State Custody" with the United States District Court, Western District of Arkansas, Eastern Division, on June 30, 1981. That Petition, *inter alia*, attacked the voluntariness of a guilty plea entered in the Pulaski County, Arkansas, Circuit Court in 1979. The State of Arkansas had charged Mr. Hill with first degree murder and theft of property. The negotiated plea entered into by Mr. Hill resulted in a sentence of thirty-five years imprisonment for first degree murder with a ten year concurrent term on a theft of property conviction. In his petition for writ of habeas corpus, Mr. Hill alleged that his attorney informed him that he would only have six years to serve on his sentence if he "stayed out of trouble". He alleged that his attorney failed to inform him of the ramifications of Ark. Stat. Ann. §43-2828(2) and §43-2829(3), known as Act 93. These sections govern potential parole eligibility requiring a lengthier term for second offenders. As a result of a previous Florida conviction, Mr. Hill was a second offender under the act, and was not and is not eligible for parole consideration until having served one-half of his term less good time or approximately nine years. The United States District Court entered an order on March 2, 1983, denying the petitioner's request for an evidentiary hearing. Mr. Hill appealed to the United States Court of Appeals for the Eighth Circuit asserting that he was entitled to an evidentiary hearing in regard to the voluntariness of his plea and the competency of his court appointed attorney. The three judge panel of the Eighth Circuit by a two to one vote affirmed the decision of the United States District Court. Mr.

Hill petitioned for rehearing en banc. Rehearing en banc was granted. By a five/five split vote the Eighth Circuit Court of Appeals affirmed the decision of the United States District Court. The memorandum opinion of the United States District Court may be found herein in Section A of the Appendix and the opinion of the United States Court of Apeals of the Eighth Circuit appears herein in Section B of the Appendix.

QUESTION PRESENTED FOR REVIEW

Is a state prisoner entitled to an evidentiary hearing in a United States District Court habeas corpus proceeding where the prisoner has pled in his petition that his state court negotiated guilty plea was involuntary and resulted from ineffective representation of counsel in that his attorney misadvised him as to his potential parole eligibility date and as a result of that advice the prisoner accepted the plea offer and entered the guilty plea?

ARGUMENT

Mr. Hill asserts that the position taken by the United States Court of Appeals for the Eighth Circuit has resulted in the interpretation of an important question of federal law which has not been but should be settled by this court and further asserts that the United States Court of Appeals for the Eighth Circuit has taken a position in its holding in this case which is in conflict with the decisions of other courts.

The Petitioner Mr. Hill was charged with first degree murder and theft of property in the Pulaski County Circuit Court in Little Rock, Arkansas, in 1978. In 1979 Mr. Hill entered negotiated pleas to both charges. He received a sentence of 35 years on the first degree murder charge and a concurrent sentence of ten years on the theft of property charge.

In effect at the time of Mr. Hill's guilty pleas was a state law governing potential parole eligibility requiring service of a longer term for second offenders before they could become eligible for parole. Ark. Stat. Ann. §§43-2828(2) and 2829(3) (known among inmates as "Act 93"). Mr. Hill is and was a second offender under that act and was not and is not eligible for parole until having served one-half of his sentence with credit for good time. Mr. Hill contended in his petition for writ of habeas corpus that his appointed attorney advised him prior to entering the guilty pleas that he would be parole eligible after serving one-third of his sentence less good time (approximately six years). Petitioner alleged in his petition for writ of habeas corpus that his plea was not voluntary as a result of the erroneous advice of counsel and that he did not receive effective representation as required by the Sixth Amendment of the United States Constitution.

The United States District Court for the Eastern District of Arkansas, Western Division by Judge G.

Thomas Eisele found that Mr. Hill had failed to state an actionable claim under habeas proceedings and dismissed the petition without an evidentiary hearing. The case was appealed to the United States Court of Appeals for the Eighth Circuit. In a split decision the three judge panel affirmed. Following the granting of a petition for rehearing en banc, the Eighth Circuit Court of Appeals split evenly thereby affirming the decision of the lower court.

Mr. Hill contends that his counsel's erroneous advice concerning his parole eligibility date was a critical factor in his decision to enter the guilty pleas. As pointed out in the United States District Court's Memorandum and Order at 12, (Appendix A herein), Mr. Hill will have to serve at least nine years of the thirty-five years before he can become eligible for parole. If he were parole eligible as he had anticipated, he would have to serve six years before meeting the parole board. Therefore, Mr. Hill argues that his potential parole eligibility date was an important consequence of his plea upon which he alleges that his counsel misadvised him.

This Court has stated that a plea cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. *Johnston v. Zerbst*, 304 U.S. 458, 468 (1938). The critical importance of the earliest potential parole eligibility date when negotiating a guilty plea cannot be ignored. Attorneys' affidavits were provided to the United States District Court (referred to in the Eighth Circuit's decision, Appendix B hereto at p. B-3) confirming the importance of an attorney's advice to his client concerning parole eligibility in negotiating pleas. These three affidavits were those of attorneys actively engaged in the practice of criminal defense work.

The United States Court of Appeals for the Eighth Circuit held that the information Mr. Hill allegedly received from his attorney regarding his parole eligibility was not

sufficient to render his guilty plea involuntary as a matter of law. (Appendix B hereto at p. B-7). Further, the United States Court of Appeals for the Eighth Circuit, relying on the reasoning of the United States District Court, found that it was undesirable that claimed misadvice on parole eligibility could potentially render pleas involuntary. That court held, "Further reasons articulated by the District Court make it undesirable that claimed misadvice on parole eligibility render the plea involuntary. The Petitioner's behavior and legislative and administrative changes in parole eligibility rules may affect this date. Every plea bargaining arrangement thus would be subject to reopening any time a Defendant did not become eligible for parole at the time estimated. We do not believe that the Constitution requires this conclusion." (Appendix B herein at B-7 and B-8). The decisions of other United States Circuit Courts of Appeals and state appellate courts are in conflict with the position of the Eighth Circuit set out in the language above.

The United States Court of Appeals for the Fourth Circuit regards as incompetent an attorney who wrongly informs a client contemplating a plea bargain that the client will spend less time incarcerated than the published law mandates. *O'Tuel v. Osborne*, 706 F.2d 498, 500 (4th Cir. 1983); and *Strader v. Garrison*, 611 F.2d 61, 63 (4th Cir. 1979). In *Strader, supra*, the defendant's lawyer assured his client that by pleading guilty and accepting a thirty year sentence to run concurrently with a prior sentence, the defendant would not extend his potential parole eligibility date. However, state law was different. His potential parole eligibility date was extended by several years as a result of the additional concurrent sentence. In *O'Tuel, supra*, the attorney failed to discover that the applicable statute for parole eligibility had been amended and consequently informed his client that he would be eligible for parole after ten years when he was actually ineligible for parole until serving twenty years. The *Strader* case describes the attorney's action as "gross misconduct". Following the

Strader standard, the Petitioner asserts that a difference in time served of three years before potential parole eligibility meets the *Strader* gross misconduct standard.

In *United States ex rel Ternullo*, 510 F.2d 844 (2d Cir. 1975), the United States Court of Appeals for the Second Circuit found that a defendant was entitled to an evidentiary hearing upon an allegation that his plea was involuntary as a result of the erroneous advice of his attorney as to potential parole eligibility dates. There the defendant had pled guilty to second degree robbery and had received a prison term of five to fifteen years. His attorney indicated in a letter that it was his understanding that the sentence was from five to fifteen years and that his client would be released on serving two-thirds of the minimum sentence with good behavior or approximately two years. The Court stated that the attorney's advice was clearly a misrepresentation of then existing New York law. Applicable New York law passed three years prior to the entry of the plea stated that a defendant sentenced to an indeterminate term would not be eligible for parole until he had served the minimum period fixed by the court. The Second Circuit found that the prisoner was entitled to an evidentiary hearing to determine whether his plea was rendered without understanding of his sentencing possibilities. The Court pointed out that counsel was not being second-guessed about a prediction which was proven inaccurate but rather from the statement of an easily accessible fact.

In *United States v. Baylin*, 531 F.Supp. 741 (Del. 1982) aff'd, 696 F.2d 1030 (3rd Cir. 1982) the Delaware District Court held that any unilateral expectation on a pleading defendant's part as to his likely date of parole, not induced by an "affirmative" misrepresentation (emphasis added) could not provide the basis for challenging a guilty plea. The holding suggests in dictum that an attorney's advice concerning a guilty plea where inaccurate may state grounds for post conviction relief.

As indicated above, certain state appellate courts have taken positions in conflict with the United States Court of Appeals for the Eighth Circuit. In *People v. Owsley*, 66 Ill. App. 3rd 234, 383 N.E.2d 271 (1978), the Illinois Appellate Court reviewed the order of a lower court judge summarily dismissing without a hearing a petition for post-conviction relief alleging that the defendant's trial attorney during plea negotiations misrepresented among other things the time the defendant would serve before becoming parole eligible. The appellate court held that it was error to summarily dismiss the petition. The Court held that the trial court should determine whether the allegations in the petition reviewed against the record of the guilty plea hearing were so palpably incredible, patently frivolous, or false as to warrant summary dismissal. See also, *People v. Ramos*, 472 N.Y.S.2d 339 (1984).

Mr. Hill does not contend nor does he need to reach the constitutional issue of whether the trial court should have inquired as to his understanding of his potential parole eligibility. Rule 24 of the Arkansas Rules of Criminal Procedure does not require such an inquiry nor do the Federal Rules of Criminal Procedure at Rule 11(C)(1). It should be noted that not all courts agree with that approach. A California appellate court has held that the failure by the Court to advise a defendant of a statute requiring a minimum term for parole eligibility renders a plea involuntary. *People v. Tabucchi*, 64 Cal. App. 3rd 133, 134 Cal. Rptr. 245 (1976). In *Tabucchi, supra*, the Defendant was sentenced to a minimum term of five years, and mistakenly believed that he would be parole eligible after serving one-third of the five year term. To his surprise he was not eligible for parole until he had served three years of the minimum term. The California Appellate Court held—

> Recognizing the critical importance to a defendant of the right to parole and recognizing the wide spread knowledge of persons charged with crime concerning

> the "one-third minimum time" parole policy of the adult authority in usual cases, we believe that notice to a defendant of any statutorily required minimum term for parole eligibility contrary to and of greater duration than the usual adult authority policy based on Penal Code, Section 3049, is constitutionally required as a prerequisite to entry of a guilty plea . . . such a minimum term for parole eligibility must be deemed a direct rather than a collateral consequence of the guilty *Tabucchi, supra*, 64 Cal. App. 3rd at 143, 134 Cal. Rptr. at 251.

The Illinois Supreme Court has held that the trial court's failure to admonish a defendant concerning a mandatory period of parole when accepting his guilty plea is a factor to be considered in determining the voluntariness of the plea. *People v. Wills*, 61 Ill.2d 105, 330 N.E.2d 505 (1975), and, see also, *People v. Blackburn*, 46 Ill. App.2d 213, 360 N.E.2d 1159 (1977).

Several state court appellate decisions address the effect of a trial court judge's misadvice to the defendant concerning his potential parole eligibility at time of sentencing. In *Arizona v. Holbert*, 114 Ariz. 244, 560 P.2d 428 (1977), the defendant pled guilty to second degree armed burglary and armed robbery and was sentenced to concurrent terms of not less than forty nor more than sixty years on both counts. The defendant's use of a gun during the commission of the offense rendered him ineligible for parole until serving the minimum term. None of the attorneys present nor the sentencing judge properly explained the consequences of the statute controlling parole eligibility to the defendant. The Court, while inquiring about the defendant's understanding of the plea, stated that the defendant was not eligible for parole until the expiration of five calendar years, a gross misstatement of his parole eligibility. Neither the defense attorney nor the prosecutor corrected the judge. The Arizona court found that the plea was, therefore, not knowingly and intelligently made and that the defendant did not understand the true consequences of his plea. In

Washington v. Harvey, 5 Wash. App. 719, 491 P.2d 660 (1971), the lower court had erroneously advised the defendant that the Board of Prison Terms and Paroles could determine what minimum term might be set where the consecutive terms imposed by the court created a mandatory minimum term. The court's erroneous advice rendered the plea defective.

Similarly, the prosecuting attorney's erroneous advice to a defendant concerning potential parole eligibility has been held to render a plea involuntary. In *Allen v. Cranor*, 45 Wash. 2d 25, 272 P.2d 153 (1954), a prosecuting attorney told the defendant that the parole board could set a minimum term of imprisonment when the law had been amended to deprive the board of that authority. Based on the erroneous advice given by the prosecutor, the guilty plea was set aside and habeas relief was granted.

Mr. Hill also raised in his petition the contention that he was denied effective assistance of counsel as guaranteed by the Sixth Amendment by his appointed attorney's failure to advise him correctly as to his potential parole eligibility date. The test for effective assistance of counsel is found in *Strickland v. Washington*, 104 S.Ct. 2052, 2064 (1984). In the instant case the United States Court of Appeals for the Eighth Circuit found that "counsel's advice concerning Hill's parole eligibility, even if not wholly accurate, does not amount to constitutionally inadequate performance and is not a dereliction of duty sufficient, by itself, to allow Hill to withdraw his guilty plea." (Appendix B hereto at p. B-8).

While the United States Court of Appeals for the Eighth Circuit is correct in asserting that counsel is not required to perform perfectly, *Strickland, supra*, at 2065, indicates that "[C]ounsel . . . has a duty to bear such skill and knowledge as will render the trial a reliable adversarial testing process." The attorneys' affidavits filed with the

United States District Court confirming the importance of properly advising clients of their parole eligibility dates should create a factual issue as to whether the adversarial nature of Mr. Hill's trial court appearance was reduced because of gross misinformation provided by his attorney. That misinformation could have been cured by the mere reading of a statute.

After showing that counsel's performance is deficient, *Strickland, supra*, at 1064, requires a review of whether counsel's errors were so serious as to deprive the defendant of a fair trial. [i.e. "(the errors of counsel) actually had an adverse effect on the defense." *Strickland, supra*, at 2067.] The adverse effect in Mr. Hill's case is obvious in that counsel's alleged errors resulted in a plea and waiver of a trial. At least a factual issue should exist as to whether or not Mr. Hill's appointed attorney acted within the range of competence demanded of attorneys in criminal cases, and to whether any failure to act competently prejudiced the outcome of Mr. Hill's proceeding. The reasonableness of Mr. Hill's attorney's conduct and likelihood of prejudice is best established at a hearing.

SUMMARY

For the reasons set forth in the argument, this case is one of imperative public importance involving a question of constitutional law which has not been but should be settled by this court, and therefore, the petitioner's request for writ of certiorari should be granted.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT
PINE BLUFF DIVISION
(Filed Feb. 28, 1983)

March 2, 1983
Attorney General
of Arkansas

WILLIAM LLOYD HILL PETITIONER

VS. CASE NO. PB-C-81-217

A.L. LOCKHART, Director, Arkansas
Department of Correction RESPONDENT

MEMORANDUM AND ORDER

The Court has received a petition for a writ of habeas corpus from William Lloyd Hill, an inmate of the Wrightsville Unit of the Arkansas Department of Correction. Petitioner pleaded guilty on April 16, 1979, in Pulaski County Circuit Court to the charges of first degree murder and theft of property. He is currently serving concurrent sentences of thirty-five years and ten years respectively.

In the present petition, petitioner contends his incarceration is unconstitutional for the following reasons:

1. His guilty plea was involuntary in that the sentence imposed was in violation of a negotiated plea bargain;

2. His counsel was ineffective in that he did not accurately advise him of his parole eligibility; and

3. He was denied due process during his appeal of the court's denial of his motion to withdraw his plea.

Petitioner filed a post-conviction motion under Rule 37 of the Arkansas Rules of Criminal Procedure, raising ground one, but the motion was denied on October 21, 1980 (Respondent's Exhibit to his Response, Exhibit B). Petitioner subsequently filed a motion to withdraw his plea pursuant to Rule 26.1 of the Arkansas Rules of Criminal Procedure, but his motion was found to be untimely filed and without merit. (Respondent's Exhibit to his Response, Exhibits C and D). Respondent concedes that petitioner has exhausted his state remedies.

I.

Petitioner contends that he agreed to plead guilty with the understanding that his sentence would be thirty-five years for first degree murder and ten years for theft of property, to be served concurrently and that he would only have to serve one-third of that sentence, less good time, to be eligible for parole. He further contends that under the provisions of *Ark. Stat. Ann.* § 43-2828, *et seq.*, he must serve one-half of his sentence before he is eligible for parole and that this renders his guilty plea involuntary. Petitioner requests that his plea "be vacated as void, or have corrective measures applied whereby the sentence both conforms to Arkansas law and approximates the conditions petitioner originally was led to believe existed—eligibility for parole consideration after having served six (6) years." (Tr. 54, Traverse and Reply to Respondent's Response to Petition for Writ of Habeas Corpus.)

At least part of petitioner's argument is misplaced. His actual sentence complied with the terms of the plea agreement. At the plea hearing the prosecutor stated, "Your Honor, the State has agreed upon a plea of guilty to recommend that Mr. Hill receive a total sentence of 35 years in the Arkansas State Penitentiary, . . . and then the other one will be ten years and that will be concurrent with it for a total of 35." (Trial Tr. p. 1). Petitioner affirmed to the Court that this was the plea agreement. (Trial Tr. pp. 1 and 4). The

Court entered a judgment of guilty and sentenced petitioner to the agreed upon term,[1] and then stated that petitioner would be required to serve at least one-third of his time before being eligible for parole. (Trial Tr. p. 5). There is no factual basis for petitioner's argument that the prosecutor did not fulfill his part of the bargain or that the Court did not impose the bargained for sentence. Petitioner's parole eligibility was not part of that bargain.

Petitioner is in reality arguing that his plea of guilty was involuntary because he was not aware of Arkansas' parole eligibility law which would require that he serve one-half of his sentence instead of only one-third. In other words, he was not fully aware of all of the consequences of his plea.

Because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. *Johnson v. Zerbst*, 304 U.S. 458, 466 (1938). When a defendant enters a plea of guilty, he effectively waives several constitutional rights, including the privilege against self-incrimination, the right to trial by jury and the right to confront one's accusers. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Johnson v. Zerbst*, supra at 464. For this waiver to be valid under the Due Process Clause, it must be an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, supra. Although a guilty plea must be intelligently made to be valid, it does not follow that such a plea is vulnerable to collateral attack solely because the petitioner did not correctly assess every factor which con-

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[1]The transcript indicates that the judge stated "two years for theft of property" but this Court views this either as a misstatement or typographical error. It is obvious that the Judge meant to impose the bargained for sentence and the docket sheet (Petitioner's Exhibit A, Tr. 50) clearly indicates that the sentence was ten years for theft of property. In any event, this would not alter this Court's finding because the issue is not raised here.

tributed to his decision. *Brady v. United States*, 397 U.S. 742 (1970); *Thundershield v. Solem*, 565 F.2d 1018 (8th Cir. 1977), *cert. denied*, 435 U.S. 954 (1978).

> To withstand a constitutional challenge a guilty plea must represent 'a voluntary and intelligent choice among the alternative courses of action open to the defendant.' Thus, a state court may not accept a guilty plea unless the defendant enters it voluntarily and with sufficient understanding of the charge and the likely consequences of his plea. Although states must adhere to this standard, there is no constitutional requirement that the trial court employ a particular litany to validate a guilty plea. Instead, when a prisoner alleges that a guilty plea proceeding in state court was constitutionally defective because he was not specifically informed of one of the consequences of his plea, that is, the possible sentence, the issue is whether he was aware of the actual sentencing possibilities and, if not, whether accurate information would have made any difference in his decision to plead guilty.

Rouse v. Foster, 672 F.2d 649, 651 (8th Cir. 1982) (citations and footnote omitted).

Petitioner was questioned extensively at the plea hearing. The transcript of that hearing reveals the following:

> THE COURT: Are you William Lloyd Hill?
>
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: And you want to plead guilty to this charge with this sentence in mind?
>
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: Are you guilty?
>
> DEFENDANT HILL: Yes, sir.
>
> ....

> THE COURT: All right. Is this your signature on the bottom of this plea statement?
>
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: Has your attorney explained this statement to you?
>
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: Do you understand it?
>
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: Do you have any questions about it?
>
> DEFENDANT HILL: No, sir.
>
> THE COURT: Any threats or promises made to get you to enter the plea of guilty?
>
> DEFENDANT HILL: No, sir.
>
> THE COURT: Other than the negotiated plea?
>
> DEFENDANT HILL: No, sir.
>
> ....
>
> THE COURT: Well, all thing considered, of course, you understand that you are entitled to trial by jury on this case and have them determine your guilt or innocence, as well as fix the punishment in this case. Do you understand that?
>
> DEFENDANT HILL: Yes, sir. I understand that.
>
> THE COURT: You are entitled to call witnesses in your own behalf and cross examine witnesses called by the state. Are you aware of that?
>
> DEFENDANT HILL: Yes, sir; I am.

THE COURT: All things considered, it is your decision advising with your attorney to enter a plea of guilty on the negotiated plea of 35 years for murder and 10 years for theft of property?

DEFENDANT HILL: Yes, sir.

In *Pennington v. Housewright*, 666 F.2d 329 (8th Cir. 1981), the Eighth Circuit examined the Arkansas procedures for acceptance of guilty pleas and found that they were sufficient to show that Pennington's plea was voluntary. The Court noted that under *Blackledge v. Allison*, 431 U.S. 63 (1977), the Arkansas procedures would require a district court to grant a habeas petitioner a hearing " 'only in the most extraordinary circumstances.' A transcript of the plea hearing is in the record. The prosecutor told the court the plea was negotiated. The defendant said he understood the negotiated plea to be that which the prosecutor described. Thus the secrecy which surrounded Allison's plea bargain was absent in the instant case." 666 F.2d at 331-2.

In noting that a guilty plea received under Arkansas' procedures is not immune from attack through habeas corpus, the Court observed that "The voluntariness of a plea could be established more conclusively if, for example, the legitimacy of plea bargaining were expressly stated, the defendant were the first person asked to describe the terms of the plea bargain, and the defendant were informed of his eligibility for parole" 666 F.2d at 332, n. 5. The Court cited *Durant v. United States*, 410 F.2d 689 (1st Cir. 1969), in which it was held that "ineligibility for parole is a consequence of a plea of guilty and under Rule 11 the district court should not have accepted the guilty plea without first informing the defendant that conviction upon the plea would make him ineligible for parole" 410 F.2d at 693. The *Pennington* Court further noted, however, that under Fed.R.Crim.P. 11(c)(2) (Advis. Comm. Notes 1974 Amend.), the disclosure of such information is optional.

Petitioner's parole eligibility date is governed by Act 93 of 1977 (Ark. Stat. Ann. §§ 43-2828-29). There is no constitutional or inherent right of a convicted person to be released on parole prior to the expiration of a valid sentence, and a convicted person is not entitled to parole unless the state's statutory provisions governing parole release expressly create such an entitlement. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). Under Arkansas' statutory scheme, only the possibility of parole is established. *Robinson v. Mabry*, 476 F. Supp. 1022 (E.D. Ark. 1979). The mere possibility of parole provides nothing more than a hope that the benefit will be obtained. *Greenholtz, supra*, at 11.

It appears that the Eighth Circuit has not directly ruled on the question of whether parole eligibility is such a consequence of a guilty plea that the state court's failure to adequately advise a defendant of such would entitle him to habeas relief. It is clear that under Rule 11 of the Fed.R.Crim. P. such advice is optional. While *Pennington* indicates that such advice is desired, it does not require it.

In *Hunter v. Fogg*, 616 F.2d 55 (2d Cir. 1980), the petitioner contended that he had been misled by the court, the prosecutor and his attorney concerning the length of possible minimum sentence because he had been misinformed about his parole eligibility date. Petitioner's attorney filed an affidavit, stating that he had told petitioner that one year would be his earliest possible eligibility date, that petitioner's plea included an understanding that he would not be sentenced as a "predicate felon," and that he believed that petitioner would not have pleaded guilty had he known that he would be eligible for parole only after serving five years of his sentence. The district court granted the petition, but the Second Circuit reversed, finding that "the constitutional requirements of a state court guilty plea include informing a defendant of a mandatory minimum sentence (the lowest possible maximum), but do not include informing him of the minimum portion of his sentence a court may require him to serve." 616 F.2d at 61.

> Having concluded that the constitutional requirements of a state court guilty plea do not include informing a defendant of the minimum portion of a sentence that a court may require him to serve, we see even less need to require that a defendant be informed of the minimum period of imprisonment that might be set by a parole board. The setting of MPI is more analogous to a parole release decision than to a minimum judicial sentence.

Supra, at 61-62.[2]

> The consequences which must be understood are only those which flow from the plea. Potential parole eligibility, absent special limitations, is not a direct incident to a guilty plea, and need not be previously communicated to a defendant . . . .
>
> Many aspects of traditional parole need not be communicated to the defendant by the trial judge under the umbrella of Rule 11. For example, a defendant need not be advised of all conceivable consequences such as when he may be considered for parole or that, if he violates his parole, he will again be imprisoned . . . .
>
> If the parole ineligibility were for defendant's entire term, then, any guilty plea would have to reflect that understanding . . . .

Bell v. State of North Carolina, 576 F.2d 564, 565-566 (4th Cir.) *cert. denied* 439 U.S. 956 (1978).

This Court concludes that even if petitioner was misled by predictions of counsel or by the statement of the sentencing judge that he would have to serve at least one-third of his sentence before being eligible for parole, his parole eligibility is not such a consequence of his guilty plea that such misinformation renders his plea involuntary.

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[2]This Court notes here that although the trial court did not inform the present petitioner of the minimum and maximum sentence possible, petitioner suffered no prejudice because the Court honored the plea bargain.

II.

Petitioner's second contention is that his counsel was ineffective in that he did not adequately advise him of his parole eligibility. Petitioner specifically contends that his attorney did not inform him of the existence of Act 93 or its applicability to him or that the court could impose a different sentence than the one for which he had bargained and that his attorney told him that he would only have to serve six years of his sentence if he stayed out of trouble. The Court determined above that petitioner received the benefit of his bargain and, therefore, is entitled to no relief with regard to this specific allegation.

> A guilty plea is open to attack on the ground that counsel did not provide the defendant with 'reasonably competent advice . . . .' We have repeatedly held that counsel fails to render the constitutionally required effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances . . . . In order to prevail on an ineffective assistance of counsel theory, a habeas petitioner must establish that: (1) his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would have performed under the same set of circumstances; and (2) that his lawyer's ineffectiveness prejudiced him . . . .

Hawkman v. Parratt, 661 F.2d 1161, 1165 (8th Cir. 1981). (Citations omitted).

> 'When a defendant pleads guilty on the advice of counsel, the attorney has the duty to advise the defendant of the available options and possible consequences.' A guilty plea must represent the informed, self-determined choice of the defendant among practicable alternatives; a guilty plea cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising him regarding the consequences of entering a guilty plea and of the feasible op-

> tions. To prove that counsel was ineffective, the habeas petitioner must demonstrate that the advice was not within the range of competence demanded of attorneys in criminal cases.

Supra at 1170. (Citations and footnotes omitted).

> In the guilty plea context, a lawyer need not give wholly accurate advice in order to render effective assistance; he need not correctly predict the admissibility of evidence or anticipate future judicial holdings. His advice, however, must be 'within the range of competence demanded of attorneys in criminal cases.'

Supra, n. 18.

This Court finds that the fact that petitioner's attorney may have advised him incorrectly as to his parole eligibility date does not render counsel's performance constitutionally inadequate. As stated above, aspects of traditional parole eligibility need not be communicated to a defendant. It follows then that even if an attorney's advice concerning such eligibility is not wholly accurate, such advice does not render that attorney's performance constitutionally inadequate. Petitioner is not entitled to relief on this ground.

III.

Petitioner's third ground for relief is that he was denied due process during his appeal of the court's denial of his motion to withdraw his plea. He contends that he was not allowed sufficient time to file a "traverse" to the prosecutor's response to his motion to withdraw his plea. The exhibits filed with respondent's answer to petitioner's petition before this Court include certified copies of the Order and Judgment denying petitioner's motion. (Respondent's Exhibits C and D). Exhibit C is an Order dated March 17, 1981, in which the court denied petitioner's motion as being untimely filed. Exhibit D is a Judgment entered nunc pro tunc to March 17. This Court finds that such an allegation

fails to state a ground upon which habeas relief could be granted.

On September 20, 1982, petitioner filed a motion for a temporary restraining order, stating that he had been transferred from the Cummins Unit of the Arkansas Department of Correction to the Wrightsville Unit and that the law library at Wrightsville and his access to it was inadequate for him to prepare legal documents relating to his petition. This Court ordered that the respondent be served with a copy of the motion and that he respond. His response reflects that petitioner has now been transferred back to Cummins. It appears that the motion is now moot.

Although the merits of the petitioner's claim have been thoroughly addressed, the Court is compelled to comment briefly on the policy considerations at stake here, for this case exemplifies the pitfalls of the plea bargaining system.

Here, the federal court is at the mercy of the plea bargainer who claims that not only the sentencing court, but his own counsel, failed to inform him of the possible consequences of his plea with respect to parole. Yet in this case, like many others, there is no evidence of intentional misrepresentation by either the state or the petitioner's counsel concerning the plea bargain. Neither is there any evidence that the court misinformed the petitioner with respect to the bargain. The court was entirely correct in stating, *after accepting the plea of guilty*, that the defendant would have to serve *at least* one-third of his sentence before becoming eligible for parole. Strictly speaking, that would entail a term of approximately 12 years (one third of 35 years). If the one-third rule applied to the petitioner, and he accrued maximum good time (one month for each month served), he could have been eligible for parole in six years. As it now stands, the one-half rule applies and, coupled with maximum good time, he could be eligible for parole in nine years. Nine years is actually *less* than one third of the actual

sentence imposed, yet the Court would be appalled if the state contended that, because the judge stated that the petitioner had to serve *at least* one-third of his sentence, the petitioner had to actually serve 12 years. The petitioner wants the bargain to cut but one way, his way, and thus one of the many flaws in the plea bargaining system is exposed.

Notwithstanding this Court's numerical speculations, the "bargain" of the plea bargain is for the sentence *imposed*, not for the time actually to be served. Neither the court, the state, nor the petitioner's attorney can possibly know the minimum time the defendant must serve before becoming eligible for parole. The petitioner's own behavior is the primary determinant of his parole eligibility date. Likewise legislative or administrative changes in the parole eligibility rules made subsequent to the petitioner's sentencing could affect the date. If that should occur could the prisoner come back and claim that the sentencing judge lied to him, or that his attorney was incompetent because he or she did not forewarn the petitioner that such events might occur?

The simple fact is, if the federal courts are to enforce plea bargaining agreements, they should be enforced with this understanding: the defendant must serve no longer a term for the offense to which he pleaded than that to which the judge sentenced him. That is the agreement. Neither the court, the state nor the defendant's attorney can determine when and if he will be eligible for parole. And statements made by those parties concerning parole eligiblity, unless they are made falsely or misinform with respect to the maximum sentence that is *actually imposed*, should not be considered as determinative of whether the guilty plea was made voluntarily or whether the defendant received the benefit of his bargain. To allow otherwise would be to establish a basis for reopening every plea bargaining arrangement any time a defendant did not become eligible for parole at the time estimated by the attorneys or the court.

It is therefore Ordered that this petition be, and it is hereby, denied.

It is further Ordered that petitioner's motion for a temporary prestraining order be, and it is hereby, denied.

It is so Ordered this 28th day of February, 1983.

/s/ Garrett Thomas Eisele
United States District Judge

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 83-1397

William Lloyd Hill,	*
	*
Appellant,	*
	* Appeal from the United
v.	* States District Court for
	* the Eastern District of
A.L. Lockhart, Director	* Arkansas
Arkansas Department of	*
Correction,	*
	*
Appellee.	*

Submitted: September 15, 1983

Filed: April 9, 1984

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

William Lloyd Hill appeals the denial of his petition for writ of habeas corpus under 28 U.S.C. § 2254 (1977). Hill pleaded guilty to a charge of first degree murder and theft of property in the Circuit Court of Pulaski County, Arkansas, and was sentenced to thirty-five years imprisonment for the murder and a ten-year concurrent sentence for the theft. Hill claims that he

entered the guilty plea with the understanding that he would have to serve only one-third of his sentence, less good time, before becoming eligible for parole. Because he is a second offender, he is not eligible for parole until he has served one-half of his term less good time. We affirm the order of the district court.[1]

The district court refused an evidentiary hearing and based its ruling on the record before it. The district court set out in some detail the questioning at the plea hearing:

> THE COURT: And you want to plead guilty to this charge with this sentence in mind?
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: Are you guilty?
>
> DEFENDANT HILL: Yes, sir.
>
> . . . .
>
> THE COURT: All right. Is this your signature on the bottom of this plea statement?
>
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: Has your attorney explained this statement to you?
>
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: Do you understand it?
>
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: Do you have any questions about it?

[1]The Honorable G. Thomas Eisele, United States District Judge for the Eastern District of Arkansas.

> DEFENDANT HILL: No, sir.
>
> THE COURT: Any threats or promises made to get you to enter the plea of guilty?
>
> DEFENDANT HILL: No, sir.
>
> THE COURT: Other than the negotiated plea?
>
> DEFENDANT HILL: No, sir.

The district court concluded that Hill's parole eligibility was not of such consequence that his guilty plea was rendered involuntary and that the incorrect advice as to parole eligibility did not render counsel's performance constitutionally inadequate. The court found no constitutional violation in denying Hill's motion to withdraw his plea. The district court observed that the state trial court had been correct in informing Hill that he would have to serve at least one-third of his sentence before becoming eligible for parole, and pointed out that with maximum good time and application of the one-half rather than the one-third rule Hill could become eligible for parole in nine years. This is less than one-third of the sentence imposed and it was this sentence, rather than the time actually to be served that was the bargain involved with respect to the plea.

Act 93, Ark. Stat. Ann. §§ 43-2828(2) and 43-2829(3) (1977), mandates that a second offender serve one-half of his term less good time. Failure to be advised of this statute is the issue in this case. As the district court properly observed, whether the incorrect advice as to parole eligibility would entitle Hill to habeas relief is a question of first impression in this circuit.

Hill in his petition attached affidavits of two attorneys which discussed the importance of the possible parole date in plea negotiations. Hill contended in his petition that the advice given him by counsel was that he would be eligible for parole after serving one third of his sentence, less good

time, which would be approximately six years. The attorney failed to inform him of Act 93 requiring that as a second offender he serve one-half of his term, less good time, which would be approximately nine years.

Hill's contention on this appeal is that he is entitled to an evidentiary hearing on whether his plea was voluntary in view of the incorrect advice given him by his lawyer.

I.

The details of parole eligibility are considered collateral rather than direct consequences of a plea, of which a defendant need not be informed before pleading guilty. *Cepulonis v. Ponte*, 699 F.2d 573 (1st Cir. 1983); *Hunter v. Fogg*, 616 F.2d 55 (2d Cir. 1980); *Trujillo v. United States*, 377 F.2d 266 (5th Cir.), *cert. denied*, 389 U.S. 899 (1967).

Neither the Federal[2] nor Arkansas[3] Rules of Criminal Procedure require that information about parole eligibility be explained to a defendant. We should not, by judicial opinion, require state procedures to provide state defendants with information that our rules do not require be given to federal defendants. As the Second Circuit explained in reference to Rule 11, as a matter of federal constitutional law, a higher standard should not be applied to a state judge than is applied to a federal district judge performing the same function. *Hunter, supra*, 616 F.2d at 61.

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[2]Fed. R. Crim. P. 11(c)(1). As expxlained in the notes to Rule 11 of the Federal Rules of Criminal Procedure (Advis. Comm. Notes 1974 Amend.), under the 1974 amendment to Rule 11 it is not required that the defendant be informed of parole eligibility. In *Moody v. United States*, 469 F.2d 705 (8th Cir. 1972), this Court held that ineligibility for parole was a direct consequence of a guilty plea. However, that decision was prior to the 1974 amendment to rule 11, and as this Court noted in *Pennington v. Housewright*, 666 F.2d 329, 332 n.5 (8th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982), the rule no longer requires that a defendant be advised about parole eligibility. *Cf. United States v. DeGand*, 614 F.2d 176 (8th Cir. 1980).

[3]*Rightmire v. State*, 627 S.W.2d 10 (Ark. 1982).

II.

We believe the district court properly relied on *Hunter v. Fogg, supra*. In *Hunter* the petitioner claimed that he had been misled by the court, the prosecutor and his attorney concerning his possible minimum sentence because he had been misinformed about his parole eligibility date. The *Hunter* court reasoned that the minimum period of imprisonment is more analogous to a parole release decision than a minimum judicial sentence; therefore the constitutional requirements of a state court guilty plea include informing a defendant of a mandatory minimum sentence, but do not include informing him of his parole eligibility date. The *Hunter* court refused to vacate the petitioner's conviction, holding that "[t]he voluntariness of a guilty plea is not undermined by lack of explanation as to the mechanics of a parole system . . . ." 616 F.2d at 62.

The Fourth Circuit in *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979), reached a contrary conclusion. In *Strader* the court held that when the misadvice of a lawyer is so gross as to amount to a denial of the constitutional right to the effective assistance of counsel, the defendant must be allowed to withdraw his plea of guilty.

This is not a case involving intentional misrepresentation. The district court was correct in informing Hill that he would have to serve at least one-third of his sentence before becoming eligible for parole. Even under the one-half rule of Act 93, with maximum good time, Hill could be eligible for parole in nine years. This is less than one-third of the actual sentence imposed. The district court properly concluded that the plea bargain is for the judicial sentence imposed, not the actual time to be served. As is evident from the transcript of the plea proceedings, Hill's parole eligibility date was not a part of the plea bargain. The agreement, by which the state is bound and to which Hill is entitled, is simply that he will serve no longer a term than that to which the judge sentenced him.

The plea hearing also did not concern itself in any respect with allowance for good time. After the court had pronounced sentence and allowed petitioner credit for the four months served, he asked, "Do you have any questions about the plea or sentence or anything having to do with this case," and Hill's answer was, "No." Hill's lawyer at the plea hearing is now deceased. There is nothing to indicate that at the time the plea was entered the good-time allowance or parole eligibility were considerations in the decision to enter a guilty plea.

Even in *Strader*, the court stated that a defendant's plea is not rendered involuntary in a constitutional sense if he is not informed of all the possible indirect and collateral consequences of his plea; and the *Strader* court recognized that ordinarily parole eligibility is such an indirect and collateral consequence that the defendant need not be specifically advised by the court or counsel before accepting a guilty plea. 611 F.2d at 63.

Strader involved gross misinformation. While Strader's lawyer advised him that his thirty-year concurrent sentence would have no effect on his parole eligibility date, the published regulations of the Department of Corrections were to the contrary. This meant that his parole eligibility date was extended by one-fourth of the thirty years to eight and three-fourths years instead of the anticipated one and one-fourth years. *Strader*, 611 F.2d at 63. Such gross misinformation is not a factor in this case. The nine-year parole eligibility date under even the one-half rule does not demonstrate that Hill was grossly misinformed.[4]

[4]In another Fourth Circuit case which followed *Strader*, *supra*, gross misinformation was involved. *O'Tuel v. Osborne*, 706 F.2d 498 (4th Cir. 1983). In *O'Tuel* the defendant had been told that he would be eligible for parole in ten years when in fact he would not be eligible for parole until after he had served 20 years. 706 F.2d at 499. *Strader* and *O'Tuel* do not define "gross misinformation," but as is evident involve major miscalculations in the years. It is this miscalculation in years that is material to the individual in question rather than the reason for the miscalculation.

Although this Court has not directly ruled on the question of whether misinformation regarding parole eligibility vitiates a guilty plea, we considered an analogous situation in *United States v. DeGand*, *supra*, 614 F.2d 176. In *DeGand*, the defendant contended that his attorney misled him to believe that his sentences would run concurrently. This Court stated that "the erroneous advice of counsel as to the penalty which may be imposed does not, by itself, lead to manifest injustice sufficient to allow a defendant to withdraw his guilty plea. *Id.* at 178. In a footnote we explained that this is particularly true where the penalties are collateral rather than direct consequences of the plea. *Id.* at 178 n.4.

This case is similar to *DeGand*. Parole eligibility is not a direct consequence of a guilty plea and the alleged misinformation Hill received regarding his parole eligibility is not sufficient to render his guilty plea involuntary.

Further reasons articulated by the district court make it undesirable that claimed misadvice on parole eligibility render the plea involuntary. The petitioner's behavior and legislative and administrative changes in parole eligibility rules may effect this date. Every plea bargaining arrangement thus would be subject to reopening any time a defendant did not become eligible for parole at the time estimated. We do not believe that the constitution requires this conclusion.

III.

Hill also contends that he is entitled to habeas relief on the ground that his counsel's erroneous advice amounted to ineffective assistance of counsel in violation of the sixth amendment. To prevail on an ineffective assistance of counsel theory, a habeas petitioner must establish: (1) that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances; and (2) that he was pre-

judiced by his attorney's ineffectiveness. *Brunson v. Higgins*, 708 F.2d 1353, 1356 (8th Cir. 1983). Counsel is presumed to have rendered effective assistance. *Harris v. Housewright*, 697 F.2d 202, 206 (8th Cir. 1982).

In challenging the effectiveness of counsel, Hill must allege and prove a serious dereliction of duty on the part of counsel sufficient to show that his plea was not a voluntary and intelligent act. *McMann v. Richardson*, 397 U.S. 759, 774 (1970); *Zaehringer v. Brewer*, 635 F.2d 734, 737 (8th Cir. 1980), *cert. denied*, 454 U.S. 1100 (1981). Counsel is not required to perform perfectly. *Brunson, supra*, 708 F.2d at 1356. In the guilty plea context, a lawyer need not give wholly accurate advice in order to render effective assistance. *Hawkman v. Parratt*, 661 F.2d 1161, 1170 n. 18 (8th Cir. 1981).

In *Strader* the Fourth Circuit held that "when a defendant is grossly misinformed about his parole eligibility, and relies upon that misinformation, he is deprived of his constitutional right to counsel. 611 F.2d at 65. As previously stated, however, gross misinformation is not involved in this case. Counsel's advice concerning Hill's parole eligibility, even if not wholly accurate, does not amount to constitutionally inadequate performance and is not a dereliction of duty sufficient, by itself, to allow Hill to withdraw his guilty plea.

IV.

Since it conclusively appears from the record in this case that Hill is entitled to no relief, the district court did not err in denying Hill's petition without an evidentiary hearing.

A hearing is not required where the issues can be resolved on the basis of the record. *Lindner v. Wyrick*, 644 F.2d 724 (8th Cir.), *cert. denied*, 454 U.S. 872 (1981). This Court has found that the Arkansas guilty plea procedures

would require a hearing only in the most extraordinary circumstances. *Pennington v. Housewright, supra*, 666 F.2d at 331. *See also Blackledge v. Allison*, 431 U.S. 63, 80 n.19 (1977).

A transcript of the plea hearing is in the record, and from this transcript it is evident that Hill understood the plea bargain and his rights thereunder. Hill asserts, however, that if granted an evidentiary hearing he could establish that his counsel provided him with erroneous advice. In light of our conclusion that counsel's erroneous advice is not sufficient, by itself, to allow Hill to withdraw his guilty plea, even if Hill could establish the truth of his allegation, such would not mandate a different result. No hearing is required where a hearing could have no impact on the result. *Lindner, supra*, 644 F.2d at 729. Since Hill does not indicate any additional information material to his petition that could be adduced at a hearing, the district court's failure to hold an evidentiary hearing was not improper.

For all the reasons stated above, we affirm the order of the district court.

HEANEY, Circuit Judge, dissenting.

I respectfully dissent. Hill alleges his attorney told him before he agreed to plead guilty that he would be eligible for parole after serving one-third of his sentence less good time, or approximately six years. In fact, Arkansas law requires Hill, as a second offender, to serve at least one-half of his sentence less good time, or nine years. The Fourth Circuit regards as incompetent an attorney who wrongly informs a client contemplating a plea bargain that the client will spend less time incarcerated than the published law mandates. *O'Tuel v. Osborne*, 706 F.2d 498, 500 (4th Cir. 1983); *Strader v. Garrison*, 611 F.2d 61, 63 (4th Cir. 1979). I agree, and would remand Hill's cause to the district court for an evidentiary hearing.

A defendant who pleads guilty has no less of a right to effective assistance of counsel than the defendant who goes to trial. "When a defendant pleads guilty on the advice of counsel, the attorney has the duty to advise the defendant of the available options and possible consequences." *Beckman v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981) (citing *Brady v. United States*, 397 U.S. 742, 756 (1970)). "A guilty plea must represent the informed, self-determined choice of the defendant among practicable alternatives; a guilty plea cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising him regarding the consequences of entering a guilty plea and of the feasible options." *Hawkman v. Parratt*, 661 F.2d 1161, 1170 (8th Cir. 1981) (citations omitted).

What singles this case out from the myriad of habeas cases in which defendants claim their attorneys misled them into pleading guilty is the allegation that Hill's attorney misinformed him on the applicable law. In *Strader*, the defendant's lawyer assured his client that by pleading guilty and accepting a thirty-year sentence to run concurrently with a prior sentence, the defendant would not extend his prior parole eligibility date. This advice ran contrary to a published regulation of the state department of corrections which required recomputation of parole eligibility upon imposition of an additional concurrent sentence. In holding that the attorney's misinformation constituted ineffective assistance of counsel, the Court stated:

> This was not just a prediction that was not realized. The lawyer could have discovered the applicable rule had he looked in the published material, but he did not. The result was that Strader entered his guilty plea believing that his new eligibility date would be several years sooner than the regulations permitted.

Strader v. Garrison, supra, 611 F.2d at 63.

Similarly, in *O'Tuel v. Osborne, supra*, 706 F.2d at 499, the Court found an attorney ineffective when he failed to

discover the applicable statute had been amended and consequently informed his client that he would be eligible for parole after ten years instead of the actual twenty.

The failure to properly instruct one's client on the consequences of published law also distinguishes Hill's case from *United States v. Degand*, 614 F.2d 176 (8th Cir. 1980), relied on by the majority. Degand claimed his counsel misled him to believe that his state and federal sentences would run concurrently. At sentencing, Degand's attorney expressed his "hope that your action, Your Honor, would make it possible that we might combine time-wise the * * * imprisonment in Illinois and the federal punishment at the hands of the Federal Government in this case." *Id.* at 178. Any advice Degand's attorney gave him was based on hope of leniency rather than a misreading of the law. This distinction is important because Degand waived any reliance on his attorney's assurances of leniency when he acknowledged at the plea hearing that sentencing was in the sole discretion of the trial judge. Nothing said at Hill's plea hearing would have alerted him to his attorney's legal error. The court did not address parole eligibility until after accepting the plea. Even then, the court reinforced the attorney's error by stating Hill would have to serve "at least one-third of his sentence."

The majority distinguishes the Fourth Circuit precedents by asserting they involved "gross misconduct" by the attorneys. The majority does not attempt to define gross misconduct or distinguish the alleged misconduct of Hill's attorney. The seriousness of the attorney's misconduct cannot be calculated by merely figuring the number of years in prison the attorney's mistake cost the defendant. In *Strader*, the Court did not state the exact number of years the overlooked regulation pushed back Strader's parole eligibility date, but noted it was "several." At any rate, we cannot measure an attorney's misconduct by the relative seriousness of the defendant's offense and the consequent length of sentence. Furthermore, the magnitude of the

alleged oversight in this case is no less than in the Fourth Circuit cases. In *Strader*, the attorney did not look up the department of corrections' regulations; in *O'Tuel*, the attorney did not check the statute for amendments; here, the attorney allegedly did not consult the statute applicable to second offenders. In each case, the attorney failed to do the minimal research necesary to ascertain the applicable law. The *Strader* Court was justified in labeling this failing "gross misconduct."

I agree with the majority that the state court did not need to inform Hill of his parole eligibility date to assure the voluntariness of his plea. The collateral consequences rule should not bar an ineffective assistance of counsel claim, however, where an attorney's misadvice respecting a collateral consequence induces a defendant to plead guilty. The district court dismissed Hill's ineffective assistance of counsel claim without a hearing because it did not believe the facts alleged raised a constitutional claim. I would remand to the district court to determine whether Hill's counsel wrongly advised him on his parole eligibility prior to his plea.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 83-1397

William Lloyd Hill,	*	
	*	
Appellant,	*	
	*	
v.	*	Appeal from the United
	*	States District Court for
A.L. Lockhart, Director,	*	the Eastern District
Arkansas Department of	*	of Arkansas.
Correction,	*	
	*	
Appellee.	*	

Submitted: September 10, 1984
Filed: September 20, 1984

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG and BOWMAN, Circuit Judges, en banc.

ORDER

This case has been considered by the court en banc. The judgment of the district court is affirmed by an equally divided court.